United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

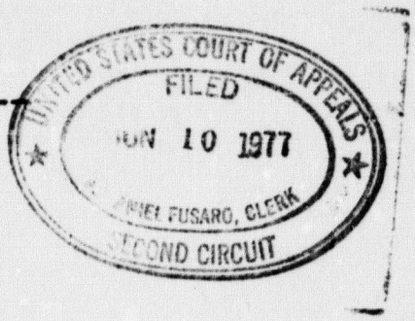
77-7050

ORIGINAL

To be argued by:

RENEE MODRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



ELEANOR KRAMER,

Plaintiff - Appellant

-against-

BOARD OF EDUCATION, COMMUNITY EDUCATION CENTER DIST. #7, STATE URBAN EDUCATION,

Defendants - Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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Plaintiff has failed to timely appeal from the judgment below granting summary judgment to defendants. In any event, the District Court properly granted summary judgment to defendants dismissing the complaint for failure to show that the discriminatory acts alleged occurred after the date Title VII of the Civil Rights Act of 1964 was amended to apply to governments, governmental agencies, and political subdivisions thereof.	9
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UNITED STATES COURT OF APPEALS
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ELEANOR KRAMER,

Plaintiff - Appellant,

-against-

BOARD OF EDUCATION, COMMUNITY
EDUCATION CENTER DISTRICT #7,
STATE URBAN EDUCATION,

Defendants - ~~Appellees~~.

APPELLEES' BRIEF

Preliminary Statement

Plaintiff, pro se, filed a notice of appeal on January 21, 1977, from an order of the United States District Court for the Southern District of New York (TENNEY,J.), dated September 29, 1976 (entered September 30, 1976) granting summary judgment to defendants.*

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*The District Court (TENNEY,J.), had also granted summary judgment to defendants dismissing the complaint on September 16, 1976, upon its opinion reported in 419 F. Supp. 958. Plaintiff is not appealing from this judgment.

QUESTIONS PRESENTED

1. Should the appeal be dismissed for failure to file a timely notice of appeal?

2. Did the District Court properly refuse to give retroactive effect to the 1972 amendments to Title VII of the Civil Rights Act of 1964 by which Title VII was made applicable to governments and their subdivisions?

3. Does plaintiff state a cause of action under Title VII for a discriminatory refusal to hire after the effective date of the 1972 amendments?

FACTS

Plaintiff, pro se, who commenced this action on or about August 29, 1975, alleging racial and sexual discrimination (Complaint, par. 10)* in the termination of her employment on June 28, 1970 and in the failure to reinstate her when openings occurred (id., paras. 8,9) sought injunctive relief and damages, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200e-5(g). Plaintiff had been employed by defendant, New York City Local Community School Board No. 7 on a year to year basis as a dance instructor in a state funded program (9G Statement, par. 1).

On or about July 16, 1976, after service of an answer, defendants moved for summary judgment on the ground that the Court lacked subject matter jurisdiction in that the alleged discrimination took place in June, 1970 when the provisions of Title VII were not applicable to municipalities or their subdivisions. In "reply", plaintiff served a "notice" on or about July 9, 1976 that discriminatory acts "have and continue to take place, up to the present time"... on the part of the South Bronx Community Education Center School District #7" (Reply to Motion for Summary Judgment). Plaintiff supplied no particulars in support of her "Reply".

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* All references are to the original papers which constitute the Record on Appeal in this case.

On July 28, 1976, the District Court granted defendants' motion for summary judgment unless plaintiff could affirmatively demonstrate within twenty days " that she actually sought and was denied employment by these defendants for racially discriminatory reasons after March 24, 1972."

The plaintiff filed no additional papers by September 16, 1976. On that date the Court granted summary judgment to defendants dismissing the complaint. The judgment was entered on September 17, 1976.

By letter dated September 21, 1976 entitled "MOTION FOR REARGUMENT" , plaintiff (claiming that she never received a copy of the Court's decision granting summary judgment to defendants) stated that:1) during the course of hearings at the New York State Human Rights Commission, her former employer requested resumes to fill existing vacancies and she promptly referred it to the resumes already on file with Local School Board #7, the Community Education Center and the Board of Education and she "never heard further on this" (Motion, par. 1); 2) the State Human Rights Commission Appeals Board decided that the reasons some employees were retained by "SOMPSEC" and some were terminated was never explained or clarified (id. par 2); 3) "the Federal office of Equal Opportunity had received and dismissed her case from the incomplete files of the Human Rights Commission", the latter agency having

"misplaced or lost" the minutes of the initial hearing (id. par. 3); and 4) attempts at employment were unsuccessful at a community organization" not directly affiliated with any of the defendants", although "their Board of Directors comprise some of the same members who sit on other Boards involved with the Community Education Center" (id., par. 4), and 5) she could not obtain "research information from the Community Education Center" resulting in directly discrediting plaintiff's final grade in her graduate school studies (id., par. 5).

Defendants,by their counsel, submitted an affidavit in opposition to plaintiff's motion for reargument, and attached to the affidavit (Defendants' Exhibit 1) a copy of a letter plaintiff wrote to the Board of Education dated September 20, 1976,in which plaintiff stated that she "was laid off from employment in School District #7 in the South Bronx for reasons of budget cuts from State and Federal Programs." The letter also stated that "[F]urther placement was denied me by the Board because I then lacked credentials in the form of college degrees."

Subsequent to the entry of the order appealed from, plaintiff, on or about October 4, 1976 submitted an affidavit and documents purporting to show that she was refused employment "after the effective date of Title VII."

While these documents are not properly part of the record below, we note that they fail to support plaintiff's claim of unlawful discrimination subsequent to March 15, 1972. Indeed, except for paragraph 2 of plaintiff's affidavit, no dates are mentioned and as to paragraph 2, plaintiff's allegation that she contacted a Mr. Rodriguez before and after March 24, 1972, regarding reemployment is clearly insufficient in the absence of any showing that anyone was hired or that anyone who might have been hired was hired on the basis of race or sex rather than on the basis of qualifications presented.

OPINIONS BELOW

July 28, 1976 Opinion

On July 28, 1976, in an opinion reported at 419 F. Supp. 958, the Court held that the expanded coverage of Title VII by the 1972 Amendments to include municipalities and subdivision within the meaning of the term "employers" under the Act "did not apply retroactively to allegations of discrimination occurring prior to the effective date of the amendment on March 24, 1972," citing Monell v. Department of Social Services, 532 F. 2d 259 (2d Cir., 1976) and Weise v. Syracuse University, 522 F. 2d 397 (2d Cir. 1975). See Kramer v. Board of Education, 419 F. Supp., supra, at 959. The Court further held that "[t]his is equally so as it applies to claims for back pay as well as reinstatement" (id.).

Finding "undisputed" that the alleged discriminatory act occurred on June 28, 1970 and that the effective date of the amendments as applied to defendants was March 24, 1972, the Court concluded that "defendants were not subject to Title VII at the time of the alleged discrimination and that consequently this Court lacks jurisdiction over the subject matter of this action" (id.).

However, the Court noted, that plaintiff's reply to defendants' motion for summary judgment contained a "bare and unsupported allegation of continuing discriminatory actions "up to the present time" and "in an abundance of caution" gave

plaintiff 20 days from the filing of the order to affirmatively establish that she actively sought and was refused employment for racially discriminatory reasons after March 24, 1972 (id. at 960).

September 29, 1976 Opinion

Noting that its earlier opinion had allowed plaintiff twenty days to submit additional documentation alleging acts of discrimination occurring subsequent to March 24, 1972 and that plaintiff has failed to submit any papers within the designated time, the District Court "[i]n its discretion and pursuant to the authority of Fed. R. Civ. P. 60(b)(b)" modified its twenty day mandate and considered the "facts" presented in plaintiff's "motion for reargument". The Court found these allegations "vague" in that they failed "to make reference to the specific period of time involved or expound upon events or acts of defendants which the Court could characterize as discriminatory in intentions or effect." Memorandum, September 29, 1976 at page 3. Accordingly, the Court held that "plaintiff fails to evince any acts of racial or sex-based discrimination occurring at a point in time after March 24, 1972, when the provisions of Title VII of the Civil Rights Act of 1964, were made applicable to municipalities and their subdivisions such as defendants" and ordered that summary judgment for defendants be entered.

ARGUMENT

PLAINTIFF HAS FAILED TO TIMELY APPEAL FROM THE JUDGMENT BELOW GRANTING SUMMARY JUDGMENT TO DEFENDANTS. IN ANY EVENT, THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS DISMISSING THE COMPLAINT FOR FAILURE TO SHOW THAT THE DISCRIMINATORY ACTS ALLEGED OCCURRED AFTER THE DATE TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 WAS AMENDED TO APPLY TO GOVERNMENTS, GOVERNMENTAL AGENCIES, AND POLITICAL SUBDIVISIONS THEREOF.

(1)

Plaintiff filed a notice of appeal, on January 21, 1977, from the order of the District Court dated September 29, 1976 and entered September 30, 1976. Under Rule 4(a) of the Rules of Appellate Procedure, an appeal as of right must be filed with the Clerk of the District Court within 30 days of the date of the order appealed from or, upon a showing of excusable neglect, the District Court may extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed. The timeliness requirements of Rule 4(a) are "mandatory and jurisdictional", Stirling v. Chemical Bank, 511 F. 2d 1030, 1031 (2d Cir., 1975), quoting from United States v. Robinson, 361 U.S. 220, 224 (1960). Where, as here, appellant neither filed a notice of appeal nor moved for an extension of time within the sixty day period, "no jurisdictional basis would exist for the District Court to grant an extension of time nunc pro tunc and dismissal of a notice of appeal filed more than 60 days after entry of judgment would be mandated." Stirling v. Chemical Bank,

supra, at 1032. Nor is a Court of Appeals permitted under Rule 26(b) F.R.A.P. to enlarge the time for filing a notice of appeal, (id. at 1032) although it could remand to the District Court if some showing had been made, especially in the case of a pro se litigant that an attempt was made, however unsuccessful to file within the time requirement (id. at 1031-1032). Here, no such showing has been made. While we believe this appeal should be dismissed, we have nonetheless briefed the merits in the interest of judicial economy, in the event that this Court decides to give plaintiff an opportunity at the District Court level to demonstrate that she made some attempt at a timely filing.

We note too that plaintiff failed to file a notice of appeal from the judgment entered on September 17, 1976, but have briefed the issues raised therein.

(2)

However sympathetic we may be to plaintiff's desire to obtain employment or reemployment with the Board of Education or Local School Board as a dance instructor, there is simply no basis for requiring her reinstatement under Title VII. She was terminated in 1970 prior to the 1972 amendments of Title VII, expanding coverage of that Title to governments, governmental agencies and political subdivisions (see 42 U.S.C. §2000e(a). The Supreme Court and this Circuit have consistently refused to grant substantive relief for discriminatory acts occurring prior to the amendments.

In Cleveland Board of Education v. La Fleur, 414 U.S. 632, 638-639, fn. 8 (1974), the Supreme Court stated that the statutory amendments passed in 1972 after the alleged discriminations in La Fleur "are, of course, inapplicable to the cases now before us."

In Weise v. Syracuse University, 522 F. 2d 397, 411 (2d Cir., 1975), this Circuit held "that the 1972 amendments subjecting educational institutions to the requirement of Title VII are not to be applied reatroactively." Moreover this Circuit could "see no valid ground" for distinguishing the discrimination claims in Weise from similar claims against the City or the Board of Education based upon a retroactive application of Title VII." Monell v. Dept. of Soc. Serv. of City of New York, 532 F. 2d 259, 262 (2d Cir., 1976), cert. granted, ____U.S. _____, 97 S. Ct. 807 (1977). [The issue upon which cert. was granted was limited to the question of whether the Board of Education is a "person" within the meaning of 42 U.S.C. §1983, See, 45 U.S.L.W. 3090, Docket No. 75-1914, id. at 3508]. In addition to damages, the plaintiffs in Weise sought "appointment" and "reinstatement" (id. at 401). Although the Court agreed with the District Court that Title VII was not to be applied retroactively, even where that relief was requested, it found sufficient the allegations of discrimination occurring after the effective date of the discrimination and remanded for further proceedings.

Here, the allegations are clearly insufficient. Plaintiff has not supplied a single fact to show unlawful discrimination after March 24, 1972. At most, she alleged

(after the order appealed from was entered) that she was in contact with a Mr. Rodriguez concerning employment after March 24, 1972 (see par. 2 of her affidavit attached to her October 4, 1976 letter to Judge Tenney). Aside from the fact that these papers are not properly part of the record below, this allegation, absent a showing that there were openings for employment or that someone else less qualified was hired, do not state a claim for relief under Titile VII as amended. As this Court said in Donnelly v. Guion, 467 F. 2d 290, 293 (2d Cir., 1972), although an affidavit in opposition to a motion for summary judgment may reveal differences of opinion, the party opposing the motion must present some evidence which supports the bald assertion that there is a dispute. Under Rule 56(e) of the F.R.C.P. an adverse party... "must set forth specfic facts showing that there is a genuine issue for trial" or "summary judgment", if appropriate, shall be rendered against him.

Under these standards, the Court below properly granted summary judgment.

CONCLUSION

The appeal should be dismissed as untimely. In the alternative, the order appealed from should be affirmed.

June 2, 1977.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Defendants-Appellees.

LEONARD KOERNER,
RENEE MODRY,

of Counsel.

AFFIDAVIT OF SERVICE ON ~~ATTORNEY~~ BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 2 day of JUNE, 1977, he served the annexed APPLE, BRIEF upon ELEANOR KRAMER (NAVARRO) ~~Esq., the attorney for~~ the PLTFF PRO-SE herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said ~~attorney at~~ No. 214 FENIMORE RD. in ~~the~~ ~~Borough of~~ MAMARONECK, ~~City of~~ New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
2 day of JUNE, 1977

CHARLES W. SEGAL
Notary Public, State of New York
No. 31-4604732
Qualified in Queens County
Commission Expires March 30, 19[illegible]

Charles W. Segal

Bruce Garner

Form 323-50M-701067(75) 346